

SERVED: November 12, 1992

NTSB Order No. EM-168

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 24th day of October, 1992

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| J. W. KIME,                | ) |               |
| Commandant,                | ) |               |
| United States Coast Guard, | ) |               |
|                            | ) |               |
|                            | ) |               |
| v.                         | ) | Docket ME-138 |
|                            | ) |               |
|                            | ) |               |
| DARRELL WAYNE PALMER,      | ) |               |
|                            | ) |               |
| Appellant.                 | ) |               |
| _____                      | ) |               |

**OPINION AND ORDER**

Appellant challenges an October 26, 1989 decision of the Vice Commandant (Appeal No. 2490) affirming a three month suspension (to be remitted on 12 months' probation) of his merchant mariner's license (No. 248403) as ordered by Coast Guard Administrative Law Judge H. J. Gardner on August 18, 1988.<sup>1</sup> The law judge had sustained a charge of misconduct in connection with

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<sup>1</sup>Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

appellant's service as operator aboard the M/V ROMAN HOLIDAY on December 11, 1987, on specifications alleging that on that date

the appellant operated the vessel when it did not have on board a valid U.S. Coast Guard Certificate of Inspection while carrying more than six passengers, a valid U.S. Coast Guard Certificate of Documentation while operating on a coastwise voyage, or three fire extinguishers in serviceable condition, in violation of, respectively, 46 U.S.C. Section 3311, 46 C.F.R. §67.45-21, and 46 C.F.R. § 25.30-20. Further, it was alleged that during the subject voyage the vessel operated in restricted visibility when it did not have a proper sounding device or proper masthead and side navigation lights, as required by various Inland Rules of the Road (specifically, Rules 33, 35, 21 and 23).

On appeal to the Board, the appellant takes exception only to the determinations that certificates of inspection and documentation were required to be aboard the vessel for the voyage on which he served as the operator or master. As we find that the appellant has not demonstrated error in the Coast Guard's conclusions that they were so required, his appeal will be denied.

Briefly stated, the charge of misconduct in this case arose from appellant's service as the operator of the ROMAN HOLIDAY in Newport Harbor, California during an evening cruise for which the vessel had been secretly chartered by a Marine Safety Office of the Coast Guard, posing as a small business that wanted to give its employees an office Christmas party. Because, in the Coast

Guard's judgment, the charter agreement between the fictional firm and the charter company, Mastroianni Yacht Charters (MYC), did not constitute a valid bareboat charter, that is, one in which essentially all of the hallmarks of control had been relinquished by the vessel owner for the period of the charter, the vessel was not exempt from inspection and documentation requirements.

In his appeal, appellant, by counsel, does not contest the validity of the judgment that a demise or bareboat charter had not been created, notwithstanding the terms of the agreement that was executed by the parties. Rather, he contends, among other things, that he should not be held accountable for the vessel's noncompliance with laws that resulted from the fact that the charter agreement he personally played no part in negotiating was a sham. We find no basis in this or in any of appellant's other arguments for reversing the Vice Commandant's decision.

Appellant's brief to the Board, for the most part, raises the same objections to the law judge's decision as were pressed on direct appeal to the Vice Commandant. Nevertheless, appellant makes no effort to demonstrate to us why the Vice Commandant's resolution of his various contentions should be rejected. For example, appellant argues that the Coast Guard's failure to prove that there were more than six individuals aboard the vessel who would be defined as "passengers" under 46 U.S.C. Section 2101(21)(B)<sup>2</sup> requires dismissal of the specifications concerning

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<sup>2</sup>Under 46 U.S.C. Section 2101(35), a "small passenger

the vessel's lack of certificates of inspection or documentation.<sup>3</sup> However, as the Coast Guard points out, all of the twenty-four Coast Guard personnel aboard the vessel would have to be considered passengers unless they were employees of a demise charterer of the vessel. Since a valid bareboat charter was found not to have existed, the Coast Guard did not have the burden of showing that at least seven members of the charter party were not employed by the fictitious business concern.

Assuming, arguendo, that scienter is an element of a charge of misconduct based on an alleged violation of law, we agree with the Coast Guard that appellant has not demonstrated error in the law judge's finding that he knew or should have known that a valid bareboat charter did not exist. In this connection, we need look no further than the evidence that the owner of the vessel undertook to advise appellant shortly before the cruise that he did not want the vessel to be taken out of the harbor

(..continued)

vessel" such as the ROMAN HOLIDAY is defined as "a vessel of less than 100 gross tons carrying more than 6 passengers (as defined in clause (21)(B) and (C) of this section)." 46 U.S.C. Section 3301(8) makes "small passenger vessels" subject to inspection under the scope and standards set forth in Section 3305.

<sup>3</sup>Appellant does not explain why the number of passengers aboard the vessel is relevant to the issue of the alleged necessity for the ROMAN HOLIDAY to have had a certificate of documentation. 46 C.F.R. § 67.01-5 requires, unless a vessel is exempt under § 67.01-7, documentation for "[a]ny vessel of at least 5 net tons which engages in ... coastwise trade...." Arguably, appellant's point is that a vessel operating pursuant to a demise charter cannot be deemed to be engaged in coastwise trade. In any event, except for suggesting that this issue is somehow tied to the fate of the allegation that a certificate of inspection was required, appellant provides no separate ground for differing with the conclusion that documentation was necessary.

that evening because of heavy fog that had already set in.<sup>4</sup> Whether or not appellant felt bound by this advice, or in fact stayed in the harbor that evening pursuant to the owner's instructions, the owner's effort to exercise authority over the navigation of the vessel appellant asserts he reasonably believed was to be operated pursuant to the terms of a genuine bareboat charter should have at least raised the appellant's suspicions concerning the bona fides of the demise. Stated differently, and contrary to his position on brief (at p. 11), appellant clearly had "a reason to question the arrangements" under which he would be serving as the vessel's operator, and, as a result, he cannot fairly claim that he was entitled to rely on the representations of MYC.

Finally, we have reviewed, and find no basis for disturbing the Vice Commandant's decision regarding, the various procedural points the appellant has raised relating to the unavailability of discovery in a Coast Guard proceeding of this kind, the scope of cross-examination permitted him by the law judge, and the adequacy and cost of the hearing transcript.

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<sup>4</sup>See Finding of Fact, No. 15, at page 8 of the law judge's decision.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The appellant's appeal is denied, and
2. The decision of the Vice Commandant affirming the order of the law judge suspending appellant's license for three months on twelve months' probation is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.